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CRIMINAL TRIALS—PRESENCE OF THE ACCUSED.

The growing tendency of some of our courts to dispense with at least a few of the many rigid rules of criminal procedure is illustrated by the case of *Stoddard v. State,* 112 N. W. (Wis.) 453. In that case the court held that, though it was a felony case, it was not error to receive the verdict while the accused was out on bail. Thus the case stands for authority that the accused on trial for felony may waive his right to be present at the rendition of the verdict.

The general rule throughout the entire laws of criminal procedure is that after indictment found, nothing shall be done in the cause in the absence of the prisoner. *Bishop on Crim. Proced.,* Vol. I., Sec. 265. But this principle has been modified somewhat by the doctrine of waiver. It is as to the extent to which the waiver may be carried that the courts fail to agree. Nearly all of our courts allow one indicted for misdemeanor to waive the right of presence during trial. *United States v. Mayo,* Fed. Cas. No. 15, 754; *Warren v. State,* 19 Ark. 214. But when the case is for felony, most of our courts have adopted from the English decisions the rigid rule that the right to be present during the whole trial is absolute and inalienable. *Prime v. Commonwealth,* 6 Harris (Pa.) 103; *Andrew v. State,* 34 Tenn. (2 Sneed) 550; *Sneed v. State,* 5 Ark. 431.

The reason for the strength of this inflexible rule evidently came from the abuse of secret examinations, so common in the reign of the Stuarts. But as memory of such high-minded methods grew dim and our judges saw the administration of justice hindered in individual cases by the invoking of technical defenses, we find this doctrine

of waiver growing in strength. The principle seems first to have been applied in cases where the prisoner was voluntarily absent for a few moments during the admission of testimony. That this should be ground for a new trial seemed absurd on its face. The dictates of common sense overcame the abstract rules. In this same way we find the courts in a considerable number of our states extending the idea to cases where accused has oportunity to be present at the rendition of the verdict, but absents himself of his own free will. *Fight v. State,* 7 Ohio (Ham.) Rep. Part 1, p. 181; *Wilson v. State,* 2 Ohio State 319; *McCorkle v. State,* 14 Ind. 39; *Schlinger v. People,* 102 Ill. 245; *Hill v. State,* 17 Wis. 675. The two earliest of these cases, *Fight v. State* and *Wilson v. State,* on which the others more or less rely, were decided on the ground that the rule requiring the presence of the prisoner during every part of the trial, was one purely for the prisoner's own benefit and hence, a right which he could waive. If he can waive the right to trial altogether by pleading guilty, why can he not voluntarily be absent from some part of the proceedings? Where he is out on bail, some of the courts say that it is his duty to return to receive the verdict. Is it not absurd, then, that he should be permitted to take advantage of his own wrong and breach of duty, and thus defeat the ends of justice?

But the courts in the majority of our states refuse to follow this reasoning and repudiate the idea that a prisoner may waive the right of presence at the rendering of the verdict. *Prime v. Commonwealth, Supra; Andrew v. State, Supra.* These courts look beyond the individual prisoner in the individual case and consider the required presence of the accused as one of the bulwarks against the possibility of irregular court proceedings. It is on this ground that the judges, who oppose the encroachments of this doctrine of waiver on the stricter criminal procedure, stand. Chief Justice Smith, *dissenting* in *State v. Kelly,* 97 N. C. 409, stated the idea very clearly, when he said: "I am not disposed to relax those safeguards which the wisdom of past ages has provided for the security of persons charged with crime, while the modern tendency is manifested in some of the courts to dispense with them, upon the idea of waiver, because of the inconvenient necessity for a new trial, which an observance of them may render necessary. . . . Now, it is true, the conduct of the accused in his hasty departure, when the jury were about to deliver their verdict, the purport of which he seems to have anticipated, entitles him to no favor, but it is the importance and value of the principle which is sacrificed in giving effect to a verdict thus rendered."

But the judges favoring a more liberal criminal procedure claim that this principle, which is so strongly clung to by many of our courts, is one for which there is no longer any necessity. The publicity of our modern life takes away the need of protecting the prisoner by means of numerous technicalities. So we see this doctrine of waiver growing in many of our states along with the movement toward a less frequent granting of new trials because of some slight technicality. The idea looks towards the leaving of more of the minor details of trial within the discretion of the trial judge. He is

in a position to know the ins and outs of the whole case and should be best fitted to determine the minor matters of procedure as they arise.

Of course there are disadvantages attending any loosening of our procedure. But despatch is an essential of justice just as is stability. It is a significant sign when public sentiment favors doing away with many of the technical protections thrown about the accused, and feels safe in looking for substantial justice at the hands of our judges. The allowing of a prisoner to waive, by mere voluntary absence or otherwise, his right to be present at the rendition of the verdict seems in line with this general trend of sentiment.

INTERSTATE COMMERCE—REBATES UNDER THE EILKIN'S LAW OF 1903.

Interstate commerce as coming within the purview of the constitutional provision that "Congress shall have power . . . to regulate commerce with foreign nations, among the several states and with the Indian tribes," has been the subject of various litigations, and perhaps equally as varied *dicta* by the courts. The judicial construction of this clause begins in 1824 with the case of *Gibbons v. Ogden,* wherein Chief Justice Marshall declared that the power to regulate, being the power to prescribe rules by which commerce is to be governed, is complete as vested in Congress and acknowledges no limitations other than as prescribed in the constitution. The line of demarcation between interstate and intra-state commerce being under the control of the individual state, was laid down by the "original package" rule, first stated in 1827 in the case of *Brown v. Maryland.* This line of difference involving the power of the state to legislate upon interstate commerce; in the absence of any regulation by Congress, not being decided, remained a *vexata quaestio* until 1851, when the jurisdiction of the state courts was confined to those questions of local interest included under police regulations, and that, too, only in the absence of any regulations by Congress. This view was not universally adopted. The Granger cases held state regulations of interstate rates valid in case of the absence of legislation by Congress. But in 1886 the Supreme Court of United States reversed the Supreme Court of Illinois in *Wabash R. Co. v. Ill.,* 118 U. S. 557, denying to the states the power to any such regulations whatever. In the same year the Tennessee drummer case denied the power of the state to impose any tax whatever upon interstate commerce. It was then in the absence of statutory regulations whatever, except the Act of 1866, Revised Statutes, Section 5258, authorizing the formation of continuous lines and through shipments by agreements, that the Interstate Commerce Act was passed on Feb. 4, 1887.

The wide diversity of opinions during the debates in Congress, giving rise to the caustic characterization of the act as one which "nobody understands, nobody wants, and everybody is going to vote for," was fully warranted by subsequent judicial interpretation of its provisions, especially as to what were the "substantially similar circumstances and conditions" of the fourth section. Subsequent